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duced to support a witness conclusively shown to have been guilty of specific acts of misconduct, and permitting such evidence in support of a witness whose credit has very probably been impaired in the minds of the jury by emphasis on a relationship in itself innocent. H. C. B.

THE RIGHT OF MUNICIPALITIES TO MAKE BACK CHARGES A LIEN UPON THE PROPERTY TO WHICH WATER IS FURNISHED. A city ordinance provided that all water rates should be a charge against the property on which the water was furnished, and against the owner thereof. A failure to pay such rates was to be followed by turning off the water, and in no case was the water to be turned on again until arrearages had been paid in full. It was further provided that no change in ownership or occupation should in any manner affect the operation of this section of the ordinance. There was no express statutory power conferred upon the municipality to enact an ordinance of this specific character, nor was there any provision in the city charter conferring this power. The demandant petitioned to have water turned on at his premises against which there was a back charge of $1.50 incurred by a previous owner. He offered to comply with all the conditions precedent to turning on water except that of paying the said arrearage. Upon refusal by the municipality he applied for a writ of mandate, which was refused by the lower court; he appealed, and the judgment was reversed and remanded by the Court of Appeals in *Nourse* v. *City of Los Angeles,* (Cal. App.) 143 Pac. 801.

The problem presented by this case is merely a particular phase of the larger problem of the right of those who operate public utilities to make rules and regulations for the conduct of their business. Although the respondent in this case was a municipality, still a distinction must be made between a city as an agent of the state acting in its public capacity and a city acting in respect to its property in a private capacity, *Cincinnati* v. *Cameron,* 33 Oh. St. 336, 367. It acts in such private capacity when it engages in the business of supplying its citizens with water or gas, *St. Louis Brewing Co.* v. *City of St. Louis,* 140 Mo. 419. It would undoubtedly have the right to regulate the conduct of its business of this sort by ordinance, but when such an ordinance is to be derived under its implied, and not under express authority, it must meet the requirements of being reasonable, *Ex parte Green,* 94 Cal. 387. In view of these considerations, it is apparent that from this particular point of view a municipality is in no more favorable situation than a public utility company privately owned, and that the cases involving the reasonableness of the regulations of such private companies are entirely applicable when the regulations of municipally owned public utilities are concerned. A resort to these is, therefore, a legitimate proceeding in this connection.

On the question as to the right to make the payment of arrearages a condition precedent to the furnishing of water there is an irreconcilable conflict of authority; see WYMAN, PUBLIC SERVICE CORPORATIONS, § 451. In any discussion of this problem an analysis of the various circumstances under which the question arises is almost indispensable for the sake of clearness. The

question may arise under any of the following circumstances: (1) Where the arrearage has been incurred by the applicant in respect to the same property for which connections are being sought; (2) where the arrearage has been incurred by the applicant in respect to other property; (3) where it has been incurred in respect to the property which it is sought to connect but by a previous occupant toward whom the present applicant stood in no relation whatever at the time the arrearage was incurred; (4) where the arrearage has been incurred in respect to other property by one toward whom the applicant stood in some relation in respect to such property at the time the arrearage was incurred, such as landlord. It is not intended that this classification be considered exhaustive, but it may be of some help in considering the cases, and it would seem that the distinctions pointed out might have weight in determining the reasonableness of a regulation imposing the necessity of payment of back rents. In respect to case 1, there is a great deal of conflict. One line of case holds that if the present applicant owes back rates, they can be demanded as a condition precedent to further service, *Brass* v. *Rathbone* 153 N. Y. 435; but a contrary rule prevails in other jurisdictions, *Turner* v. *Revere Water Co.*, 171 Mass. 329. There would seem to be less reason for making it such a condition precedent where the back rates are owed by the applicant in connection with other property although such a regulation was upheld in *People* v. *Manhattan Gas Light Co.*, 45 Barb. 136. It is true that in this case the applicant was admitted to be insolvent, but that would seem not to have been the controlling factor. Although cases under heading 4 are few in number, it was held in *Dayton* v. *Quigley*, 29 N. J. Eq. 77, that a municipality had no right to make a regulation which would have compelled a landlord to pay for the arrearages of his tenant in one place as a condition precedent to furnishing service to another place where the same landlord leased premises to the same tenant. The instant case comes under heading 3 as given above.

The general rule with reference to regulations of this type would seem to be that they are void, *McDowell* v. *Avon-by-the Sea Land & Improvement Co.*, 71 N. J. Eq. 109; *City of Chicago* v. *N. W. Mutual Ins. Co.*, 218 Ill. 40. This provision can, however, be made where express authority is given for that purpose, and this authority may be given either by statute (*Howe* v. *City of Orange*, 70 N. J. Eq. 648) or by a charter provision in case of a private company, *Appeal of Brumm*, *22 Week. Not. Cas.* (Pa.) 137, 12 Atl. 855. It is sometimes said that such a rule, and even any regulation making prepayment of arrearages a condition precedent to service, is inconsistent with the public duties owed by these types of corporations, *Crow* v. *San Joaquin & K. R. C. & I. Co.*, 130 Cal. 309. The general reason assigned, however, is that they are unreasonable, *Linne* v. *Bredes*, 43 Wash. 540. In determining the question of reasonableness, it is submitted that the regulations that the law permits such companies and municipalities to make is an important factor. Water companies can demand the prepayment of rates, *Harbison* v. *Knoxville Water Co.*, 53 S. W. 993; moreover where the exact amount cannot be definitely determined in advance a deposit can be required, *Williams* v. *Mu-*

tual Gas Co., 52 Mich. 499. In view of the fact that the argument often advanced for the reasonableness of the regulations here under discussion, is that it affords a convenient method of securing the payment of rates, it would seem that this is already adequately secured, and hence a strong case must be made out before the reasonableness of this type of regulation can be upheld. An argument against this type of rule, stated with great force in the case of *City of Houston* v. *Lockwood Inv. Co.* (Tex. Civ. App. 1912), 144 S. W. 685, is that it compels one person to pay the debts of another. As the court there says, "Where the original owner of the premises has gotten into arrears and does not pay, under these ordinances, the subsequent purchaser may be forced to pay, not for water which he will use, but for a debt incurred for water used by a prior owner and for arrearages charged against a prior owner, which, it is apparent, the city of Houston might have prevented by strictly enforcing against the former owner its own regulations." An attempt is sometimes made by municipalities to uphold such regulations as were in dispute in the present case by considering such water rates as taxes. But neither in law, nor in the strict sense of that term, can they be considered such, *City of Chicago* v. *N. W. Mutual Ins. Co.*, 218 Ill. 40. In whatever way they are looked at, therefore, it is submitted that they ought not to be supported. In one of the cases in which express statutory authority existed, the regulation and the statute are supported on the theory that they are reasonable. If the position in this case (*City of Atlanta* v. *Burton*, 90 Ga. 486), s correct, then they ought to be upheld as valid even where there is no such express authority, for it is difficult to see how a legislative fiat can make that reasonable which in the absence thereof was otherwise.

A question might legitimately be asked, in those cases where the regulation is supported on the basis of express legislative authority, as to the constitutionality of such statutes, since their effect is certainly to make one person liable for the debt of another, and since they can be upheld only as an exercise of the police power of the state or its political divisions, and these should be reasonable. But as far as this question is concerned, no case examined raised the question, and only future litigation can settle that point. H. R.

USURY AS A DEFENSE AGAINST A HOLDER IN DUE COURSE.—The Negotiable Instruments Law, enacted in all but five or six of the States, was the result of a desire and necessity for certain and uniform rules controlling the use of commercial paper and the rights and liabilities incident thereto. The New York Act of 1897 was re-enacted with slight modifications in the other States, and in most instances was copied verbatim. Even this precaution has failed at times to gain the desired uniformity, for courts have construed the same language to opposite conclusions, due to diverse rules in the pre-existing State law. This fact is well illustrated by cases decided during December, 1914, in Iowa and New York.

In *Perry Savings Bank* v. *Fitzgerald* (Iowa, 1914), 149 N. W. 497, plaintiff, a holder in due course, brought an action against the maker of a promissory note. The defense was, that the note was composed of usurious inter-